

2005 Additions to
Pattern Jury Instructions: Fifth Circuit, Civil Cases
Prepared by the Committee on Pattern Jury Instructions District Judges
Association Fifth Circuit

Three new jury instructions for 2005:

11. Labor And Employment Claims

11.4 Committee Introduction to Supervisor Sexual Harassment Charges

The following overview of sexual harassment law, as it pertains to supervisor sexual harassment claims, is not intended to encompass all permutations judges and juries will face. Likewise, none of the pattern jury charges on sexual harassment supervisor liability is designed to cover all possible factual situations, and should be modified to conform to the pleadings and the evidence.

In [*Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65-66 \(1986\)](#), the United States Supreme Court held that sexual harassment is "a form of sex discrimination prohibited by Title VII." The Court credited the Fifth Circuit as the first federal circuit court of appeals "to recognize a cause of action based upon a discriminatory work environment." [*Id.* at 65-66](#) (citing [*Rogers v. EEOC*, 454 F.2d 234 \(5th Cir. 1971\)](#) (harassment based on national origin)).

In 1993, the United States Supreme Court held Title VII prohibits employers from permitting the workplace to be permeated by discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive so as to alter the conditions of a plaintiff's employment and to create an abusive working environment. See [*Harris v. Forklift Sys., Inc.*, 510 U.S. 17 \(1993\)](#). The Court noted this standard takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a psychological injury.

In 1998, the United States Supreme Court clarified when and how an employer will be liable for sexual harassment when the alleged harasser is the plaintiff's supervisor. See [*Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 \(1998\)](#); [*Faragher v. City of Boca Raton*, 524 U.S. 775 \(1998\)](#). A supervisor is defined as one with immediate or successively higher authority over the plaintiff. The Court held an employer will be vicariously liable if the plaintiff experienced a tangible employment action because he or she rejected the supervisor's sexual requests--but may avoid liability if there was no tangible employment action and the employer establishes the elements of an affirmative defense. Also in 1998, the Supreme Court recognized same-sex sexual harassment as actionable under Title VII. See [*Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 \(1998\)](#).

Finally, in 2004, the Supreme Court addressed the question of whether and, if so, under what circumstances a constructive discharge can be considered a tangible employment action that deprives the employer of the *Faragher/ Ellerth* affirmative defense. See [*Pennsylvania State Police v. Suders*, 124 S. Ct. 2342 \(2004\)](#). A constructive discharge requires a showing that the abusive working environment became so intolerable that "resignation qualified as a fitting response." [*Id.* at 2347](#).
11.4.1 Title VII--Sex Discrimination-- Supervisor Sexual Harassment Without Tangible Employment Action (Hostile Work Environment)

A. Committee Notes

This charge is for use in cases where a plaintiff seeks to impose vicarious liability on an employer

for supervisor sexual harassment where the agency relationship aided the supervisor in creating a hostile or abusive work environment, yet plaintiff did not experience a tangible employment action. See [*Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 758 \(1998\)](#). This charge should be used only where the alleged harassment has sexual content or connotation. See [*Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 \(1998\)](#). Neither the title of this charge nor the numbering before each paragraph should be submitted to the jury.

B. Charge

1. Plaintiff claims [he/she] was sexually harassed by [his/her] supervisor and that [his/her] employer, Defendant, is responsible for the harassing conduct.
2. Defendant denies Plaintiff's claims and asserts that [insert Defendant's reasons].
3. It is unlawful for an employer to discriminate against an employee because of the employee's sex. Sex discrimination includes sexual harassment.
4. Sexual harassment is unwelcome conduct that includes sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature. [FN1](#) The conduct need not, however, be motivated by sexual desire. [FN2](#) Conduct is unwelcome if it is unsolicited or uninvited and is undesirable or offensive to the employee. [FN3](#)
5. For Defendant to be liable for sexual harassment, the conduct must be sufficiently severe or pervasive to alter the terms or conditions of Plaintiff's employment and create a hostile or abusive work environment. [FN4](#) To determine whether the conduct in this case rises to a level that alters the terms or conditions of Plaintiff's employment, you should consider all the circumstances, including: the frequency of the conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with Plaintiff's work performance. [FN5](#) There is no requirement that the conduct be psychologically injurious. [FN6](#)
6. Simple teasing, offhand comments, sporadic use of offensive language, gender-related jokes, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. The conduct must be extreme. A workplace filled with discriminatory intimidation, ridicule, and insult may be sufficiently extreme to alter the terms and conditions of employment. [FN7](#)
7. In determining whether a hostile work environment existed, you must consider the evidence from the perspective of a reasonable person. This means you must look at the evidence from the perspective of a reasonable person's reaction to a similar environment under similar circumstances. You cannot view the evidence from the perspective of an overly sensitive person, nor can you view the evidence from the perspective of someone who is never offended. Rather, the alleged harassing behavior must be such that a reasonable person in the same or similar circumstances as Plaintiff would find the conduct offensive. [FN8](#)
8. If you find Plaintiff was sexually harassed, then you must find for Plaintiff unless Defendant proves by a preponderance of the evidence both (a) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by Defendant or to avoid harm otherwise. [FN9](#) If Defendant proves (a) and (b), you must find for Defendant.

JURY QUESTIONS

Question No. 1

Was Plaintiff sexually harassed?

Answer "Yes" or "No."

If you answered "Yes" to Question No. 1, then answer the following Question:

Question No. 2

A. Did Defendant exercise reasonable care to prevent and promptly correct any sexually harassing behavior?

Answer "Yes" or "No."

B. Did Plaintiff unreasonably fail to take advantage of any preventive or corrective opportunities provided by Defendant, or to avoid harm otherwise?

Answer "Yes" or "No."

[FN1 Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 \(1986\).FN2 Oncale v. v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 \(1998\).FN3 Waltman v. Int'l Paper Co., 875 F.2d 468, 477 \(5th Cir. 1990\).FN4 Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66-67 \(1986\); Pennsylvania State Police v. Suders, 542 U.S. ___, ___ \(2004\).FN5 Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 \(1993\).FN6 Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 \(1993\).FN7 Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 \(1993\).FN8 Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 \(1998\).FN9 Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 \(1998\).](#)(2005)

11.4.2 Title VII–Sex Discrimination– Supervisor Sexual Harassment Resulting in Tangible Employment Action (Quid Pro Quo)

A. Committee Notes

This charge is for use in cases where the plaintiff alleges he or she suffered a tangible employment action because he or she rejected sexual advances, requests, or demands by a supervisor with immediate or successively higher authority over plaintiff. Neither the title of this charge nor the paragraph numbers should be submitted to the jury.

B. Charge

1. Plaintiff claims [he/she] was [describe the tangible employment action] because [he/she] rejected [his/her] supervisor's sexual advances, requests, or demands.
2. Defendant denies Plaintiff's claims and asserts that [insert Defendant's reasons].
3. It is unlawful for an employer to discriminate against an employee because of the employee's sex. Sex discrimination includes discriminating against an employee because the employee rejects a supervisor's sexual advances, requests, or demands.
4. Plaintiff must prove she suffered a tangible employment action because [he/she] rejected [supervisor's name] sexual advances, requests, or demands. A tangible employment action is a significant change in employment status, such as hiring, firing, demotion, failing to promote, reassignment with significantly different responsibilities, undesirable reassignment, [FN1](#) or a significant change in benefits. [FN2](#)
5. You must find for Plaintiff if [he/she] proves, by a preponderance of the evidence, that:
 - a. [Supervisor's name] made sexual advances, requests, or demands to Plaintiff;
 - b. Plaintiff rejected [supervisor's name] sexual advances, requests, or demands;
 - c. Plaintiff suffered a tangible employment action; [FN3](#)
 - d. Defendant [describe tangible employment action] Plaintiff because [he/she] rejected [supervisor's name] sexual advances, requests, or demands.

6. If Plaintiff fails to prove each of these elements, then you must find for Defendant.
7. If you disbelieve the reason(s) Defendant has given for its decision, you may infer Defendant [describe tangible employment action] Plaintiff because [he/she] rejected the sexual advances, requests, or demands by [supervisor's name]. [FN4](#)
8. Plaintiff does not have to prove that [his/her] rejection of [supervisor's name] sexual advances, requests, or demands was the only reason Defendant [describe tangible employment action] Plaintiff. [FN5](#)

JURY QUESTION

- A. Did Plaintiff suffer a tangible employment action because she rejected sexual advances, requests, or demands by [supervisor's name]? [FN6](#)
- B. Did Defendant [describe tangible employment action] Plaintiff because [he/she] rejected sexual advances, requests, or demands by [supervisor's name]?
Answer "Yes" or "No."

In each of the following tax refund charges, the following introductory sentence may be appropriate:

In this case the plaintiff seeks a refund of taxes that he has paid.[FN1](#) Committee Note: Whether a reassignment is undesirable should be assessed from an objective standard, not solely from the Plaintiff's vantage point. *See generally* [Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216, 221 \(5th Cir. 1999\)](#). If this is a fact question in the case, the Court should instruct the jury accordingly.[FN2](#) [Faragher v. City of Boca Raton, 524 U.S. 775, 761 \(1998\)](#). This paragraph should not be submitted to the jury if there is no fact question whether the plaintiff experienced a tangible employment action.[FN3](#) This element should only be submitted in cases where there is a fact question whether Plaintiff suffered a tangible employment action.[FN4](#) [Ratliff v. City of Gainesville, 256 F.3d 355 \(5th Cir. 2001\)](#).[FN5](#) Following [Desert Palace v. Costa, 539 U.S. 90 \(2002\)](#), and [Rachid v. Jack in the Box, 376 F.3d 305 \(5th Cir. 2004\)](#), there are questions concerning the proper causation standard. For this reason, after much debate, this Committee reached a compromise that left the words "because of" undefined, except to note that "because of" does not connote sole cause. As the law is still in flux, the Committee recognizes that future developments in the law may require modifying this instruction.[FN6](#) This question should be used when there is a fact question whether the plaintiff experienced a tangible employment action. Where there is no question the plaintiff experienced a tangible employment action, the second question should be submitted instead.**END OF DOCUMENT "Additions to Fifth Circuit Pattern Jury Instructions Civil 2005"**